

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE ANDERSON,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 259712

Wayne Circuit Court

LC No. 04-005596-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to three years' probation for his felon in possession of a firearm conviction, and five years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

On May 8, 2004, a team of officers of the Detroit Police Department executed a search warrant at 9425 Van Dyke in Detroit, Michigan, a commercial location that is a combination of a carwash, fix-it shop and barbershop. When the police arrived in the barbershop area, three men were present: a patron sitting in the barber chair getting a haircut, the patron's father waiting in a chair, and defendant, who was cutting the patron's hair. While searching the area, Sergeant Andrew White looked inside a pouch on the back of the barber chair and found a loaded gun with the barrel down and handle up; the opening of the pouch faced where defendant was standing while he was cutting hair. White testified that the gun that was found had no identifiable prints was not registered to anyone. Rodney Colbert, owner of the property, stated that the barbershop only had one barber chair, that the pouch was always there, and that defendant and two other barbers used the chair. Colbert also stated that he had never seen the gun before and did not know it was in the pouch. Terrance Tyrone Harris, one of the other barbers, testified at trial that the gun was his, but although he had been questioned by the police before trial, he had not said anything about the gun being his at that time.

Defendant's first issue on appeal is that he was denied his right to a fair and impartial trial when the prosecutor interjected references to drugs into evidence, diverted the jury's attention to peripheral and prejudicial matters, and engaged in an improper closing argument by referencing the fact that drugs were found at the scene of defendant's arrest and defendant had been previously convicted of felony-firearm. We disagree. A defendant must question an alleged prosecutorial impropriety before the trial court in order to preserve the issue for appeal.

People v Nimeth, 236 Mich App 616, 625; 601 NW2d 393 (1999). Defendant properly preserved his claim that the prosecutor committed misconduct during his rebuttal argument when he referenced the fact that drugs were found at the scene of defendant's arrest and defendant had been previously convicted of felony-firearm, but defendant failed to properly preserve his remaining claims of prosecutorial misconduct. Preserved claims of prosecutorial misconduct are evaluated on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Unpreserved claims of prosecutorial misconduct are reviewed for plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal of unpreserved claims is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice (On Remand)*, *supra*, p 438. A prosecutor may not attack defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury, but the prosecutor's remarks must be considered in context with defense counsel's comments and actions. *Watson*, *supra*, pp 592-593. Furthermore, a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, but may argue reasonable inferences from the evidence to support his theory of the case. *Watson*, *supra*, p 588. However, a prosecutor's comments must be considered in light of the defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003). Under the invited response doctrine, an instance of prosecutorial misconduct which might otherwise require reversal may not require reversal if it occurred in response to conduct of the defendant which invited the response. *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). Whether the invited response requires reversal depends on the nature of the defendant's initiating conduct and the proportionality of the response. *Id.* at 353.

Defendant's preserved argument, that the prosecutor's rebuttal comments that drugs were found at the arrest scene and that defendant had been previously convicted of felony-firearm, denied defendant a fair and impartial trial, fails. At the beginning of trial, the parties stipulated that defendant had been previously convicted of a felony and was not eligible to possess a firearm. The trial judge ruled that the parties were not to mention what specific felony defendant had been previously convicted of and were not to reference the fact that drugs were found at the scene where defendant was arrested. The parties followed this stipulation throughout trial and did not enter into evidence the fact that drugs were found at the arrest scene or the fact that defendant had been previously convicted of felony-firearm. The prosecutor's rebuttal comments, that drugs were found at the arrest scene and defendant had been previously convicted of felony-firearm, therefore appear improper. *Watson*, *supra*, p 588; *Rice (On Remand)*, *supra*, p 438. However, after hearing both parties' arguments pertaining to whether the prosecutor could make these comments during his rebuttal, the trial judge specifically ruled that the prosecutor could make such comments during rebuttal. Furthermore, defense counsel stated in closing arguments that defendant did not have a reputation for carrying a gun and that the narcotics investigation was "a mistake" because no drugs were found at the scene of the arrest; following the doctrine of invited response, we conclude that the trial judge's ruling was proper. *Jones*, *supra*, pp 352-353.

And the trial judge instructed the jury on several occasions that the attorneys' comments and arguments were not to be considered evidence. We find that the prosecutor's rebuttal comments did not deny defendant a fair and impartial trial. *Jones, supra*, pp 352-353; *Watson, supra*, p 586.

Defendant's three unpreserved claims of improper comments by the prosecutor also fail. First, defendant argues that the prosecutor's comments throughout trial that the police were conducting a search pursuant to a warrant for narcotics were improper; we disagree. Sergeant Andrew White testified that the police went to the location of defendant's arrest to execute a search warrant and investigate the sale of narcotics, so any comments regarding such event were proper comments on admitted evidence. Contrary to defendant's assertion, the trial judge did not rule that the parties could not comment that the police were conducting a search warrant for narcotics, but only ruled that the parties could not state that drugs were found at the location.

Second, defendant argues that the prosecutor's rebuttal comments that defendant was a drug dealer were improper; again we disagree. White testified that the police were conducting a search for narcotics. Officer Larry Williams, the search warrant affiant, testified that he had previously seen defendant at the location of the arrest and defendant was described in the warrant because a confidential informant had previously gone inside the location to purchase drugs and had given defendant's description as the seller. Finally, \$683 cash was found on defendant's person when he was arrested. From the evidence presented, one could reasonably infer that defendant possessed the gun so that he could protect himself when drugs were sold in his place of business; we find that the prosecutor's comment was proper in support of her theory of the case. *Watson, supra*, p 588.

Third, defendant argues that the prosecutor's closing argument comments that defense counsel was feeding Terrance Tyrone Harris answers, was deliberately trying to mislead the jury and was performing a "trial by ambush" were improper, and again we disagree. At trial, defense counsel was continually admonished for asking Harris leading questions. Also, Harris had not previously told the police or anyone else besides defense counsel that the gun in question was his, despite being asked about the event by White and Officer Michael Bryant, and defense counsel's opening statement said nothing about the fact that the gun belonged to Harris. Harris's surprise testimony that the gun was his, taken in context with defense counsel's comments and actions, lead us to conclude that the comments in question were not improper. *Watson, supra*, pp 592-593. Also the trial judge instructed the jury on several occasions that the attorneys' comments and arguments were not to be considered as evidence. We find that the prosecutor's comments did not deny defendant a fair and impartial trial, let alone amount to plain error that affected defendant's substantial rights. *Jones, supra*, pp 352-353; *Thomas, supra*, pp 453-454; *Watson, supra*, p 586.

Defendant's second issue on appeal is that the trial court erred when it allowed White and Bryant to present rebuttal testimony. We disagree. Defendant failed to properly preserve this issue for appeal, and thus, we will review for plain error. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *Thomas, supra*, pp 453-454. Reversal of an unpreserved claim is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.*

Rebuttal testimony is admissible to contradict, repel, explain or disprove evidence presented by the other party in an effort to weaken or impeach it. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Rebuttal testimony should be allowed if it is “properly responsive to evidence introduced or a theory developed by the defendant.” *Id.* As long as the rebuttal testimony is responsive to material presented by the defense, it is proper rebuttal evidence, even if it overlaps evidence admitted in the prosecutor's case in chief. *Id.* “The prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter.” *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

Here, Harris claimed that the gun that was found in the pouch was his and defendant did not know the gun was there. The prosecution offered evidence that, at the time of defendant's arrest, Harris was present and never mentioned the fact that the gun was his. Harris testified that he never had an opportunity to tell the police that the gun was his because, when the police arrived, they handcuffed him and told him to be quiet. The only issue in this case is whether defendant “possessed” the gun, which includes having knowledge of the presence of the gun, having access to it and having the right to control it. *People v Terry*, 124 Mich App 656, 658, 661, 663; 335 NW2d 116 (1983). Harris's testimony was therefore critical. The prosecution called White and Bryant as rebuttal witnesses to impeach Harris's testimony by establishing that Harris spoke with the police and did have an opportunity, prior to testifying in court, to tell the police that the gun that was found at the scene of the arrest was his. The rebuttal testimony was offered to rebut defense witness Harris's direct testimony and, in turn, the defense's theory that the gun belonged to Harris and defendant did not have knowledge of the presence of the gun. We find that the trial judge did not abuse her discretion, let alone commit plain error, when she allowed White and Bryant to give the aforementioned rebuttal testimony. *Figgures, supra*, p 399; *Humphreys, supra*, p 446.

Defendant's third issue on appeal is that the trial court abused its discretion when it allowed the prosecutor to refer to the drugs that were found at the scene of defendant's arrest and to the fact that defendant had been previously convicted of felony-firearm. We disagree. When reviewing whether the trial court properly controlled the course of a trial and exercised its control over the conduct of witnesses and attorneys, this Court reviews for an abuse of discretion. *People v Smith*, 64 Mich App 263, 266-267; 235 NW2d 754 (1975). “An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias.” *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A trial court has a duty to limit the introduction of evidence and the arguments of counsel to relevant and material matters, and to assure that all parties receive a fair trial. *Ullah, supra*, p 674; MCL 768.29. Under the invited response doctrine, a prosecutor should be allowed to respond proportionally to statements made by defense counsel. *Jones, supra*, pp 352-353. Given the invited response doctrine and the fact that defense counsel stated in closing argument that defendant did not have a reputation for carrying a gun and that the narcotics investigation was a mistake because no drugs were found at the scene of the arrest, we conclude that the trial court did not abuse its discretion when it allowed the prosecutor to make the questioned rebuttal comments. *Jones, supra*, pp 352-353.

Defendant's fourth issue on appeal is that the trial court erred when it refused to give defendant's requested “unaware of weapon” instruction. We disagree. A claim of instructional

error is reviewed de novo. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 1108 (2006). Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Even if jury instructions were somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and were sufficient to protect the rights of the defendant. *Hawthorne, supra*, p 50.

A trial court must instruct the jury as to the applicable law. *People v Rodriguez*, 463 Mich 466; 620 NW2d 13 (2000). A criminal defendant has a right to a properly instructed jury, and a requested instruction which is supported by the evidence must be given. *Id.*; MCL 768.29. However, error requiring reversal based on the failure to give requested instructions only occurs if the requested instructions were substantially correct, were not substantially covered in the charge given to the jury, and concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). A court does not err in refusing to give an instruction if the proposed instruction is "confusing, inarticulate, inartfully organized or simply difficult to understand." *People v Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981).

Here, defendant requested that CJI 2d. 11.7 (defendant unaware of weapon) be given to the jury. In relevant part, CJI 2d. 11.7 states that "an essential element of the crime of carrying a concealed weapon is that the defendant must have knowingly carried the weapon." Defendant was not charged with carrying a concealed weapon; to be convicted of the charged crimes of felony-firearm and felon in possession of a firearm, it need not be established that defendant "carried" a weapon. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996); *Terry, supra*, pp 658, 661, 663. We conclude that the requested instruction was confusing, and thus, the trial court did not err when it refused to give it. *Ritsema, supra*, p 609.

The trial judge did properly instruct the jury that defendant must have possessed the firearm to be convicted of the felon in possession of a firearm charge, and must have "knowingly possessed" the firearm to be convicted of the felony-firearm charge; the judge also instructed the jury that "possession" requires that defendant must have known about the firearm and had actual physical control of the firearm or knew about the firearm and had the right to control it. *Avant, supra*, p 505; *Tice, supra*, p 50; *Terry, supra*, pp 658, 661, 663. We find no error in the trial judge's refusal to give the requested instruction.

Defendant's fifth issue on appeal is that the trial court committed plain error when it failed to sua sponte conduct an evidentiary hearing in regard to the issuance or execution of the search warrant. We hold that defendant does not have standing to argue this issue. The determination of whether a defendant has standing to challenge a search is made by discerning whether the defendant had a reasonable expectation of privacy in the place that was searched. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999). A defendant has the burden to establish that he has standing, and the court should consider the totality of the circumstances when determining if the defendant has established that he has standing to challenge the search of his office or workplace. *Id.* at 561, 563-565. Factors relevant to the determination of standing include ownership, possession and/or control of the area searched or item seized, historical use of the property or item, ability to regulate access, the totality of the circumstances surrounding the

search, the existence or nonexistence of a subjective anticipation of privacy, and the objective reasonableness of the expectation of privacy considering the specific facts of the case. *Id.* at 563.

Here, defendant did not own the business that was searched. Furthermore, defendant did not have exclusive possession or control of the area that was searched. Defendant never established that he could regulate access of the area where he worked. The place searched was a business that was most likely open to the public. Defendant did not establish that he kept private items in the area searched. We conclude that, under the circumstances, defendant did not have a reasonable expectation of privacy at his place of employment, and therefore, defendant does not have standing to challenge the search in question. *Powell, supra*, pp 563-565.

Defendant's sixth issue on appeal is that the trial court erred when it denied his motion for a directed verdict. We disagree. When reviewing a trial court's decision on a motion for a directed verdict in a criminal case, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, up to the time the motion was made, viewed in the light most favorable to the prosecutor, could have persuaded a rational trier of fact that the essential elements of the crimes charged were proved beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002).

To convict a defendant of felony-firearm, the prosecution must establish that "the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant, supra*, p 505. Felon in possession of a firearm can be the underlying felony for a felony firearm conviction. *People v Calloway*, 469 Mich 448, 450, 452; 671 NW2d 733 (2003). To establish felon in possession of a firearm, the prosecution must establish that a defendant, who has been convicted of a specified felony, possessed a firearm. *Tice, supra*, p 50; MCL 750.224f. To establish possession, the prosecution must show actual possession or show constructive possession by establishing that the defendant knew of the firearm's location, the firearm was accessible to the defendant, and the defendant had the right to control the firearm. *Terry, supra*, pp 658, 661, 663. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). This Court must afford deference to the jury's special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Here, the parties stipulated that defendant was a previously convicted felon who was not allowed to possess a firearm under the felon in possession of a firearm statute. Thus, if the evidence presented established that defendant "possessed" the firearm in question, a rational trier of fact could find beyond a reasonable doubt that the elements of the charged crimes were met. *Calloway, supra*, p 450; *Avant, supra*, p 505; *Tice, supra*, p 50. The prosecution established that the firearm was found in a pouch connected to the barber chair that defendant was standing right next to and had control of. No one else was present in the room besides a patron who was getting his hair cut by defendant and the patron's father who was either waiting for the patron or waiting to get his hair cut. The prosecution established that the gun was loaded and easily accessible to defendant, and that defendant had a large amount of cash on his person. We conclude that a rational trier of fact could have inferred that defendant knew of the location of the firearm and had the right to control the firearm; we find that a rational trier of fact could have found beyond a reasonable doubt that the elements of the charged crimes were met. *Calloway, supra*, p 450; *Avant, supra*, p 505; *Tice, supra*, p 50; *Warren (After Remand), supra*, p 588;

Terry, supra, pp 658, 661, 663. The trial court did not err when it denied defendant's motion for a directed verdict. *Werner, supra*, p 530.

Defendant's final issue on appeal is that the cumulative impact of the errors in this case violated defendant's due process rights and, in turn, entitle defendant to a new trial. We disagree. This Court reviews this issue to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors would not merit reversal, but the effect of the errors must have been seriously prejudicial to warrant a finding that the defendant was denied a fair trial. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002); *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Defendant has not established the occurrence of any errors. Therefore, there can be no cumulative effect of errors that would merit reversal. *Id.*

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello